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Supreme Court of The United States

OCTOBER TERM, 1962

No. 63

BARBARA D. FORD,
Petitioner,

vs.

HERMAN A. FORD,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN S. DAVENPORT, III
ANGUS H. MACAULAY, JR.
DENNY, VALENTINE & DAVENPORT
1300 Travelers Building
Richmond 19, Virginia

WESLEY M. WALKER
LEATHERWOOD, WALKER, TODD & MANN
P. O. Box 1589
Greenville, South Carolina
Attorneys for Respondent

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OPINION BELOW

An unofficial report of the opinion of the Supreme Court of South Carolina in *Ford v. Ford* (Case No. 4764, Opinion No. 17850, Filed November 15, 1961), below, may be found in 123 S.E. 2d 33 (1961).

QUESTION PRESENTED

The "Question Presented" as stated in the petition for certiorari is incomplete because it fails to describe accurately the nature of the order of the Virginia court. Completely stated such question should be:

Is a "dismissed agreed" order of a Virginia court in a custody proceeding entitled to full faith and credit in another state (as held by the Supreme Court of South Caro-

lina) when the Virginia order (*i*) admittedly was res judicata in Virginia, (*ii*) admittedly was not subject to any jurisdictional defects, and (*iii*) admittedly was not subject to modification in Virginia since there was no allegation or proof of any changed circumstances authorizing a change in the custody of the minor children?

STATEMENT OF THE CASE

This litigation actually began in Virginia during the summer of 1959. At that time Respondent discovered that Petitioner, his wife, was having sexual relations with a married man of Richmond, Virginia. This behavior was later admitted by Petitioner (R. 70-71, 86-93).

A separation of Petitioner and Respondent followed, and, in order to obtain custody of his three children who were with Petitioner in Richmond, Virginia, Respondent instituted a habeas corpus proceeding on August 28, 1959, in the Law & Equity Court of the City of Richmond, Virginia. In his petition Respondent alleged that Petitioner had "been guilty of acts which were not only of a nature that would justify . . . [Respondent's] seeking a divorce from her but which render her unfit to have the custody of . . . [their] children." In such petition Respondent also alleged that "the best interests of said children would be promoted by them being forthwith returned to the care, custody and control of . . . [Respondent]" (R. 15-18).

On September 2, 1959, Petitioner filed her return in which she alleged that she was and had been "a fit and proper person to have custody of the said infant children" and that the writ had been "issued improvidently and without probable cause" (R. 19-20). Thereafter, negotiations between the parties, both represented by counsel, resulted

in an agreement regarding custody of the children which was reduced to writing in the form of correspondence between counsel (R. 11-12, 74-75). Pursuant to this agreement and upon motion of counsel for both parties, the Law & Equity Court of the City of Richmond on November 18, 1959, entered an order which provided: "It being represented to the court by counsel that the parties hereto have agreed concerning the custody of the infant children, it is ordered that this case be dismissed" (R. 11-15, 20).

Under the agreement custody of the children was given to Respondent except that during summers and part of the Christmas holidays custody was given to Petitioner (R. 12-15). On August 10, 1960, when the children were with Petitioner in Greenville, South Carolina, under the provisions of the agreement, Petitioner, in disregard of her agreement, instituted this proceeding in the Juvenile & Domestic Relation Court of the County of Greenville, South Carolina. Process was served upon Respondent when he arrived in Greenville to inform his children of the death of their grandmother, Respondent's mother (R. 145-146). In his answer to Petitioner's complaint, Respondent alleged that he was entitled to custody and that Petitioner had "violated and breached the agreement made between the parties by and with their respective legal counsel and further violated the Order of the Court of record in Richmond, Virginia that was duly issued and based upon said agreement." Respondent further alleged that Petitioner "was guilty of gross misconduct during the time . . . [Petitioner and Respondent] resided as husband and wife and such gross misconduct included acts of adultery on numerous occasions during July and August, 1959 in Gloucester, Virginia, Chesterfield County, Virginia and a motel at Bowling Green, Virginia with a married man who resides in Richmond, Virginia" (R. 8-11). After a hearing in October, 1960, the Juvenile & Domestic

Relations Court of the County of Greenville entered an order on December 8, 1960, which awarded custody and control of the children to Petitioner subject only to reasonable rights of visitation by Respondent (R. 20-28).

Respondent appealed this order to the Court of Common Pleas for Greenville County, South Carolina. After a hearing on the record made in the court below on January 9, 1961, the Court of Common Pleas awarded custody to Petitioner and Respondent jointly, and the order of the court, entered on February 25, 1961, provided that Petitioner should have custody during the normal school year and that Respondent should have custody during the normal holiday months and during the normal Christmas holidays (R. 185-191).

An appeal by Respondent to the Supreme Court of South Carolina resulted in a reversal of the Court of Common Pleas and a reinstatement of the agreement upon which the Virginia order was based. In concluding its opinion, which was dated November 15, 1961, the Supreme Court of South Carolina, in referring to the "dismissed agreed" order of the Law & Equity Court of the City of Richmond, stated:

> "Such a judgment of dismissal entered by agreement of the parties, pursuant to a compromise or settlement of the controversy, is a judgment on the merits, barring another action for the same cause and is equivalent to a judgment of retraxit. If the respondent here had instituted in the Courts of Virginia the action commenced by her in the Courts of this State, the appellant could have successfully interposed a plea of *res judicata* as a defense to said action. Since the judgment entered in the Virginia Court by agreement or consent is *res judicata* in that State, it is *res judicata* and entitled to full faith and credit in this State. We are required under Art. IV, Sec. 1 of the Constitution of the United States to give the same faith and credit in this State to the 'dismissed agreed' order or judgment as 'by law or

usage' the Courts of Virginia would give to such order or judgment.

* * *

"... [A]fter examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action.

"Since we have reached the conclusion that the 'dismissed agreed' order of the Law and Equity Court of the City of Richmond, Virginia, is a bar to this action between the same parties for the same cause, *in the absence of any allegation or proof of any changed circumstances requiring a change of the custody of the children here involved*, the agreement reached by the parties prior to the order of the Virginia Court is still of full force and effect" (Pet. for Cert. A 11-12, 123 S.E. 2d at 39). (Emphasis added.)

On December 11, 1961, the Supreme Court of South Carolina denied a petition for rehearing filed by Petitioner, and on December 13, 1961, that court denied a motion for stay of remittitur also filed by Petitioner. On December 22, 1961, Mr. Justice Frankfurter issued an order staying the execution and enforcement of the judgment of the Supreme Court of South Carolina pending the filing of a petition for certiorari.

ARGUMENT

NO FEDERAL QUESTION OF SUBSTANCE IS INVOLVED IN THIS CASE WHICH WOULD JUSTIFY REVIEW BY THIS COURT

A.

The "Dismissed Agreed" Order of the Virginia Court Was Res Judicata and Was Not Subject to Modification in Virginia under the Circumstances

In her petition for certiorari, Petitioner does not contend that the "dismissed agreed" order of the Law & Equity Court of the City of Richmond, Virginia, was not res judicata in Virginia. Such a contention, of course, would involve a question to be determined by Virginia law, and the decision of the Supreme Court of South Carolina on this question is fully supported by the Virginia cases. See *Virginia Concrete Co. v. Board of Supervisors,* 197 Va. 821, 91 S.E. 2d 415 (1956); *Martin v. Martin,* 167 Va. 206, 188 S.E. 148 (1936); and *Bardach Iron & Steel Co. v. Tenenbaum,* 136 Va. 163, 118 S.E. 502 (1923).

Nor does Petitioner allege fraud or duress in the procurement of the Virginia order.

Nor does Petitioner contend in her petition for certiorari that a Virginia custody order will be modified by Virginia courts in the absence of materially changed conditions affecting the welfare of the children involved and arising after the entry of the prior custody order. The failure of Petitioner to make this contention is understandable because it is clear that the Virginia courts will not modify their custody decrees in the absence of such changed conditions. See *Campbell v. Campbell,* 203 Va. 61, 64, 122 S.E. 2d 658, 661 (1961) (dictum); *Semmes v. Semmes,* 201 Va. 117, 109 S.E. 2d 545

(1959); *Andrews v. Geyer*, 200 Va. 107, 104 S.E. 2d 747 (1958); and *Darnell v. Barker*, 179 Va. 86, 18 S.E. 2d 271 (1942). The factual similarity of *Semmes v. Semmes* and *Andrews v. Geyer* to the case before this Court on petition for certiorari is striking. In all three of these cases the wife was the guilty party; in all three cases the wife *agreed* to a grant of primary custody to the husband; in all three cases there was no evidence of misconduct on the part of the wife following the entry of the first custody decree; and, finally, in all three cases there was no evidence of a material change in conditions following the entry of the first decree. In the *Semmes* and *Andrews* cases the Supreme Court of Appeals of Virginia refused to modify the original decree granting custody of the children to the husband.

Nor does Petitioner contend that any material changes in conditions affecting the welfare of the children have occurred since the entry of the Virginia "dismissed agreed" order. The failure of Petitioner to make this contention is also understandable in view of the following statement by the Supreme Court of South Carolina:

> "[A]fter examining the pleadings and the entire record we find neither allegation nor proof of any changed circumstances authorizing a change of the custody of the minor children of the parties to this action" (Pet. for Cert. A 12, 123 S.E. 2d at 39).

Thus, Petitioner is seeking a review by this Court of a decision of the Supreme Court of South Carolina which held that a Virginia decree entered by agreement of the parties was entitled to full faith and credit, a Virginia decree which was res judicata in Virginia and which was not subject to modification in Virginia because no material change had occurred in conditions affecting the welfare of the children involved. Petitioner argues in her petition for certiorari that the decision of the Supreme Court of South Carolina results

in "manifest injustice" because custody was thereby awarded to Respondent (Pet. for Cert. 5-6). The use of such language is incomprehensible in view of the fact that the South Carolina decision merely required Petitioner to abide by her own agreement and the Virginia order based upon it, an agreement which Petitioner had violated within ten months after making it. Such language is equally incomprehensible in view of the fact that no court, either in Virginia or South Carolina, has ever indicated that Respondent was not a suitable custodian for his children. As the Court of Common Pleas for Greenville County, South Carolina, said:

> "I agree with the Judge of the Juvenile and Domestic Relations Court that the custody of these three minor children may well be left in the hands of either the plaintiff [Petitioner] or the defendant [Respondent]" (R. 187).

B.

The Decision of the Supreme Court of South Carolina Is in Accord with the Decisions of this Court.

Petitioner says in her petition for certiorari that "this decision of a federal question by the South Carolina Supreme Court is not in accord with the applicable decisions of this Court as expressed in *Kovacs v. Brewer*, 356 U.S. 604 (1958); [*New York ex rel.*] *Halvey v. Halvey*, 330 U.S. 610 (1947); and *May v. Anderson*, 345 U.S. 528 (1953)." (Pet. for Cert. 6). But Petitioner does not say in what respect the decision of the Supreme Court of South Carolina deviated from the decisions of this Court.

In *New York ex rel. Halvey v. Halvey*, *supra*, this Court permitted a New York court to modify the custody provisions of an *ex parte* Florida divorce decree where, in the

words of Mr. Justice Douglas, "It is not shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida law." 330 U.S. at 615. Here, conversely, the South Carolina court found, and Petitioner does not deny before this Court, that modification would not have been permitted in Virginia, for there was no evidence of changed circumstances since the Virginia decree. Therefore the South Carolina court refused modification. Mr. Justice Frankfurter said in *Halvey* that "the jurisdiction of the Florida court in making the custodial decree is doubtful." *Id.* at 618 (concurring opinion). Here no question of the jurisdiction of the Virginia court to enter its decree has ever been raised at any stage of this protracted litigation.

In *May v. Anderson, supra*, this Court held that a Wisconsin court was not required to give full faith and credit to the custody provisions of an *ex parte* Ohio divorce decree in the absence of personal jurisdiction over the wife. Here Petitioner, Respondent, and their children were personally before the Virginia court.

In *Kovacs v. Brewer, supra*, this Court remanded the case to the Supreme Court of North Carolina for clarification of the basis of it's denial of full faith and credit to a New York custody decree, stating that if it were denied in the absence of a finding of changed circumstances "difficult and important questions of constitutional law" would be raised. *Id.* at 607.

In the present case Petitioner says that the South Carolina court erred in giving full faith and credit to a Virginia "dismissed agreed" order concerning custody of minor children where no changed circumstances were alleged or proved. She says that full faith and credit should not have been given because the Virginia order was based on an agreement between the parties not disclosed to the Virginia court, but

she does not allege the violation of any constitutional right. This case does not involve what might be the more important question whether custody decrees of any sort are entitled to full faith and credit outside the state of their issuance in the absence of changed circumstances. Petitioner therefore seeks a writ of certiorari on a question of very narrow scope, primarily pertinent only to her peculiar situation. Normally this Court has not granted certiorari in such cases. See, *e.g.*, *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); Sup. Ct. R. 19-1(a); Harlan, *Manning the Dikes—Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional Statement Practice of the Supreme Court of the United States*, 13 Record of N.Y.C.B.A. 541 (1958).

The decision of the Supreme Court of South Carolina does not present a federal question of substance, and it is probably in accord with the decisions of this Court. The result prevents disgruntled parents from continuing litigation which might otherwise be pursued successively in the courts of as many as fifty jurisdictions—litigation which bears heavily on the psychological development of the children involved. The result achieves a termination of "unseemly litigious competition between the states and their respective courts as well as between parents". *New York ex rel. Halvey v. Halvey*, 330 U.S. at 620 (Mr. Justice Rutledge, concurring). And the same result would be achieved on grounds of comity and of local law. See *May v. Anderson*, 345 U.S. at 535-36 (Mr. Justice Frankfurter, concurring).

CONCLUSION

Because the Virginia custody decree was res judicata and not subject to modification in that state in the absence of changed circumstances, the Supreme Court of South Carolina properly held under the applicable decisions of this

Court that such Virginia decree was entitled to full faith and credit. Therefore, no federal question of substance is involved in this case in which review is sought by petition of certiorari and Respondent respectfully prays that such petition be denied.

JOHN S. DAVENPORT, III
ANGUS H. MACAULAY, JR.
DENNY, VALENTINE & DAVENPORT
1300 Travelers Building
Richmond 19, Virginia

WESLEY M. WALKER
LEATHERWOOD, WALKER, TODD & MANN
P. O. Box 1589
Greenville, South Carolina

Attorneys for Respondent